Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-718

CROATAN BOOKS, INC.,

Petitioner,

-vs-

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

CROATAN BOOKS, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled cases on August 1, 1978.

OPINIONS BELOW

The refusal of the petition for appeal by the Supreme Court of the Commonwealth of Virginia is unreported and is printed in Appendix A hereto, infra, page 1a. The entry of Judgment by the Circuit Court for Fairfax County, Virginia is unreported.

JURISDICTION

The Judgment of the Supreme Court of Virginia (appendix A, infra, page 1a) was entered on August 1, 1978. The jurisdiction of this Court is invoked under Title 28 Section 1257(3) of the United States Code.

QUESTIONS PRESENTED

1. When the trial Court prohibited counsel for Petitioner from arguing to the jury that the films in question were protected by the First Amendment to the United States Constitution, were the Petitioner's right to due process of law, as guaranteed by the Fifth Amendment, and the Petitioner's right to effective assistance of counsel, pursuant to the Sixth Amendment, encroached, along with the denial of Petitioner's First Amendment rights?

2. Does the First Amendment to the United States Constitution require consideration by the jury, in determining obscenity, of no smaller geographical "community standard" than a city or a county, as opposed to a neighborhood?

3. Does the First Amendment to the Constitution of the United States command in an obscenity prosecution the allegation that the offense be committed knowingly?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America (appendix B, infra, pages 2a-3a) and the Code of Virginia, Section 18.2-374(4) (appendix B, infra, page 3a-4a).

STATEMENT OF THE CASE

At the Petitioner's trial by jury held in the Circuit Court for Fairfax County, Virginia, in Criminal Numbers 25319 through 25326, which were consolidated for trial, the Commonwealth introduced, through the testimony of two (2) Police Investigators, the eight (8) motion picture projectors and films, and coin boxes which had been seized, pursuant to a search warrant, from the Petitioner's bookstore in Fairfax County, Virginia, on July 19, 1977. Each of the motion picture films were exhibited to the Court and jury. The testimony of a citizen of Fairfax County, who lived within five (5) miles of the location of the Petitioner's bookstore, was introduced by the Commonwealth in an attempt to establish the contemporary community standards of tolerance regarding sexually explicit motion pictures. The Petitioner, at the close of the Commonwealth's case, moved the Court to strike the evidence [direct verdict of acquittal], upon the ground that the warrants did not allege that the crimes were committed "knowingly". The Motion to Strike was denied, (transcript of proceedings, October 18, pages 127 through 130). The Petitioner introduced testimony of an expert witness, Doctor Lawrence Donner, who was not permitted to voice his opinion regarding the contemporary community standard of Fairfax County, (transcript of proceedings, October 17, pages 82 through 99 and October 18, page 3). The trial Court denied the Petitioner's request for instructions that the relevant community for determining contemporary standards of tolerance and/or acceptance of sexually explicit material in motion pictures geographically should be nothing less than Fairfax County as a whole, (transcript of proceedings, October 18, pages 196 through 206). During final argument to the jury, the trial Court prohibited Petitioner's Counsel from arguing that the alleged obscene films were protected by

the First Amendment to the Constitution of the United States of America, (transcript of proceedings, October 19, pages 321 through 324). Upon the jury's verdict of guilt in each case, and assessment of a One Thousand Dollar ($1,000.00) fine, in each case, the Court, having overruled the Petitioner's Motion to set aside the verdict and grant a new trial, on January 3, 1978, imposed sentence. Notice of Appeal to the Supreme Court of Virginia was timely filed on January 31, 1978. A Petition for Appeal was timely filed, and was denied by the Supreme Court of Virginia on August 1, 1978.

REASONS FOR GRANTING THIS WRIT

1. Petitioner was denied his right to due process of law, provided by the Fifth Amendment to the United States Constitution, and his right to effective assistance of counsel, provided by the Sixth Amendment to the United States Constitution, as well as his right to freedom of speech and expression, provided by the First Amendment to the United States Constitution when the trial Judge refused to allow Petitioner's counsel to argue to the jury that the challenged motion picture films were protected by the First Amendment to the United States Constitution.

The Trial Judge prohibited any reference to constitutional standards in the summation to the jury (T323) when Counsel for Petitioner was not allowed to mention the First Amendment. As grounds for this ruling, a position identical to those recently given by two other Judges in Fairfax County Circuit Court in other cases involving similar charges against Petitioner, the trial Court took the position that this issue was a question of law within the Court's jurisdiction, that the Court had decided as a matter of law that the materials were not protected by the First Amendment to the

United States Constitution when the Court denied the Petitioner's Motion to strike the evidence, [Motion for a directed verdict], and therefore the First Amendment could not be mentioned in arguments to the jury.

While holding in *Roth v. United States,* 354 US 476, 485, that obscenity is not within the area of constitutionally protected speech or press, this Court noted that the fundamental freedoms of speech and press have contributed greatly to the development of our free society and are indispensable to its continued growth, and therefore it is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. *Roth v. United States,* supra at 488. The basic guidelines for judging obscenity were enunciated in *Miller v. California,* 413 US 15, 24. Only hard core pornography, as judged under these standards, is subject to regulation by the States.

The Petitioner's First Amendment rights were encroached upon when the trial Court refused to allow Petitioner's Counsel to argue to the jury that the alleged obscene films were protected by the First Amendment to the Constitution of the United States of America, enforceable through the Fourteenth Amendment to the United States Constitution, (transcript of proceedings, October 19, pages 321 through 324). This position, which has been followed by three Judges of the Circuit Court for Fairfax County, Virginia, in other cases now pending on Appeal, where in the trial Court held its decision denying Petitioner's Motion to Strike [Motion for a directed verdict], established the law of the case and therefore the First Amendment was not applicable, is a direct affront to the myriad of cases decided by the Supreme Court of the United States since the *Roth* decision.

Since 1957, it has been established that the First Amendment to the Constitution of the United States of America

protécts all non-obscene speech and literary material, which are presumed to be non-obscene until the jury returns its verdict. This includes motion picture films, *Roth v. United States,* supra; *Jacobellis v. Ohio,* 387 US 184; *Paris Adult Theater I v. Slaton,* 413 US 49; *Jenkins v. Georgia,* 418 US 153; *United States v. Twelve 200 Foot Reels of Film,* 413 US 123. The trial Court's ruling was also in violation of the Petitioner's right to due process of law pursuant to the Fifth Amendment of the United States Constitution and resulted in the denial of effective assistance of Counsel pursuant to the Sixth Amendment to the United States Constitution, as well as the denial of the Petitioner's First Amendment rights.

II. The Circuit Court for Fairfax County, Virginia, violated the First Amendment to the Constitution of the United States of America, by denying the Petitioner's request to instruct the jury that the relevant community for determining contemporary community standards of tolerance and/or acceptance of sexually explicit material in motion pictures was nothing less than the geographical area of Fairfax County as a whole. The Court's instruction to the jury was subject to be interpreted that the relevant community was the immediate and local vicinity or neighborhood of the Petitioner's bookstore, where the alleged obscene film were presented, (transcript of proceedings, October 19, pages 196 through 206). This ruling has been the subject of comment in three opinions of the Supreme Court of the United States of America, and, at least, one decision of the Supreme Court of Virginia. In the case of *Hamling v. United States,* 418 US 87 (1974), 41 L.Ed.2d 590, a Federal prosecution in the State of California, which had a "State-wide" contemporary community standards statute, held that it is not necessary to instruct upon a national community standard, but that *Miller v. California,* supra, required only a "con-

temporary community standard". The case of *Jenkins v. Georgia,* 418 US 153, (1974), 41 L.Ed.2d 642, held there was no constitutional requirement that juries be instructed in State obscenity cases to apply the standards of a hypothetical State-wide community, asserting that *Miller v. California,* supra, approved but did not mandate, such an instruction, and that jurors may properly be instructed to apply "community standards" without a specification of the "community" by the trial Court. In the case of *Smith, DBA, Intrigue v. United States,* 431 US 291, (1977), 52 L.Ed.2d 324, another Federal prosecution, the Court, at footnote number six, in reviewing this issue, stated "the Court has never varied from the *Roth* position that the community as a whole should be the judge of obscenity, and not a small, atypical subset of the community. The only exception to this rule that has been recognized is for material aimed at a clearly defined deviat sexual group." This matter was the subject of an appeal to the Supreme Court of the State of Virginia in *Alexander v. Commonwealth,* 212 Va 554, 186 S.E.2d 43, which involved the contemporary community standard for the entire City of Portsmouth, Virginia which was found to be constitutionally acceptable by that Court. Upon review by the Supreme Court of the United States, that case was remanded upon other grounds, *Alexander v. Virginia,* 413 US 836, 37 L.Ed.2d 993, 93 S.Ct. 2803, (1973).

III. The Court below erred in failing to grant the Petitioner's Motion to Strike [Motion for directed verdict], made at the close of the Commonwealth's evidence, upon the ground that the warrants did not charge the Petitioner with "knowingly" committing this obscenity offense, (transcript of proceedings, October 18, pages 128 through 130). Since the decision of the Supreme Court of the United States in *Smith v. California,* 361 US 147, it has

been recognized that scienter, or that the obscenity offense be committed knowingly, was constitutionally mandated. The Code for the State of Virginia was amended to contain this provision, and the word "knowingly" had been inserted in each prohibition of the Virginia obscenity laws. Although the Commonwealth could have amended each warrant, pursuant to Rule 3:A8(c), the Commonwealth chose to proceed without making such a request. The failure to aver scienter in a criminal obscenity warrant was fatal to the prosecution; see *Commonwealth v. Palladino,* Supreme Court of Massachussetts, 260 N.E.2d 653, at 655 "where knowledge is an essential ingredient of the offense charged, the Defendant's knowledge must be specifically alleged."

The charging documents herein, the Warrants, allege no more of a factual basis for the charge than a mere recitation of the Virginia State Code section which the Commonwealth claimed was violated. This procedure was in violation of the protection afforded the Petitioner by the Sixth Amendment to the Constitution of the United States of America, to be informed of the nature and cause of the accusation. *United States v. Cruikshank* (1876) 92 US 542, 23 L.Ed. 588.

CONCLUSION

The questions presented in this Petition for a Writ of Certiorari concern areas of great importance and confusion to the entire nation. The problem of defining the geographical size of the community to establish standards of acceptance in obscenity prosecutions has been a vexatious one. A petition to the Supreme Court of the United States for rehearing on this very point was filed by the Attorney General for the Commonwealth of Virginia, and was denied in *Alexander v. Virginia,* 414 US 881, 38 L.Ed.2d 128, 94

S.Ct. 29 (1973), a case decided with the obscenity trilogy of *Miller, Kaplan* and *Slaton.*

The procedural issue, whether First Amendment protection may be argued to the jury in a criminal obscenity prosecution, will continue to arise in numerous cases throughout the nation. Procedural standards need to be established concerning Constitutional rights regarding the adoption of the "law of the case" theory.

The scienter issue is supplemental to this Court's decision in *Smith v. California,* 361 U.S. 147, and therefore should be clearly mandated by this Court.

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 1st day of August, 1978.

Croatan Books, Inc., Appellant,

against Record No. 780464
Circuit Court Nos. 25319
through 25326

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard R. Buisals
Deputy Clerk

APPENDIX B

Constitution of the United States

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained

by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

[Amendment XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia

§ 18.2-374. Production, publication, sale, possession, etc., of obscene items.

– It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined

in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another. (Code 1950, § 18.1-228; 1960, c. 233; 1962, c. 289; 1970, c. 204; 1975, cc. 14, 15.)

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Commonwealth of Virginia, the Respondent, prays that the Petition for Writ of Certiorari be denied.

ARGUMENT

1. The trial Court's refusal to allow either counsel for the petitioner or respondent to argue the First Amendment of the Constitution of the United States to the jury was not in error.

The Commonwealth submits that the interpretation of Constitutional standards is not a function of the jury; in this case then, the trial Court's proscribing argument to jury concerning the First Amendment protections of motion picture films was correct.

2. The trial Court's refusal to define in geographic terms the word "Community" as set out in the Commonwealth's instruction No. 4 was not in error.

Petitioner contends that the trial

Court had a legal duty to define geographically the term "Community" as set out in Commonwealth's instruction No. 4. The Commonwealth disagrees.

The Commonwealth submits that in State obscenity prosecutions, juries can properly be instructed to apply "Community Standards" as to the question of obscenity without specifying what Community. Jenkins vs. Georgia, 418 U.S. 153, 41 L Ed 2d 42, 94 S Ct. 2750 (1974).

3. The absence of the word "knowingly" on the arrest warrants does not in this case constitute grounds for reversal error.

The Commonwealth concedes that the warrants issued against petitioner in the instant cases did not charge "knowingly"

possess with intent to rent as defined in Virginia Code §18.2-374(4).

The Commonwealth's position on this issue is three-fold. Firstly, the exact Code Section was included on each and every warrant in the instant case so that petitioner had knowledge of exactly what it was being charged with. Secondly, sufficient evidence was adduced at trial by the Commonwealth to give the jury a basis for finding the petitioner was in "knowing" possession of the obscene materials. (Tr., 10-17-77, at pages 21 through 26, 30 through 32, and Commonwealth's Exhibits 2 through 10). Thirdly, Commonwealth's instruction No. 6, instructs the jury that,

> "If you believe from the evidence beyond a reasonable doubt, that

> Croatan Books, Inc. knowingly (emphasis added) possessed an obscene film with intent to rent same . . . . ".

In addition, the verdict forms used in the instant cases included the word "knowingly" so that when the jury returned its verdicts, petitioner was properly convicted. (Tr., 10-19-77, at pages 369-371).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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